IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Charan Singh.
vs.
LRs. of late Vinod Shankar Sharma & others.

S.B.CIVIL SECOND APPEAL NO.60/2006 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 14.12.2005 PASSED BY SHRI RAM CHANDRA SINGH JHALA, ADDITIONAL DISTRICT JUDGE NO.3, UDAIPUR IN CIVIL APPEAL NO.59/2001.

DATE OF JUDGMENT ::: 2.5.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. S Srimali, for the appellant.

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BY THE COURT:

Heard learned counsel for the appellant.

According to the appellant, the plaintiff Vinod Shanker alleged that he mortgaged the property to one Smt. Chander Bai on 5.11.1963. The mortgage period was 5 years. Plaintiff filed suit for redemption of mortgaged property

on 29.8.1991. However, that suit was withdrawn by moving application under Order 22 Rule 3 CPC on finding that Smt. Chander Bai was alive and said Chander Bai has not been impleaded as party in the suit. However, the Court passed an order on application of the plaintiff and permitted the plaintiff to withdraw the suit but without mentioning that the permission is with liberty to file fresh suit. The suit was dismissed as withdrawn on 22.2.1997.

The plaintiff filed fresh suit on 28.4.1997 for redemption by impleading Smt.Chander Bai also as party. The present appellant/defendant who was in possession of suit property was also impleaded as party as the present appellant claimed that he is in occupation of the property as tenant in the suit property prior to 5.11.1963 i.e. from before mortgage was created, therefore, he cannot be evicted from the suit property in any decree not passed under provisions of State Rent Act.

The trial court held that the appellant was not tenant in the suit property and decreed the suit of the plaintiff for redemption of mortgaged property by passing judgment and decree on 6.7.2001. Other defendants as well as present appellant preferred separate appeals being 59/2001 and 68/2001. Both the appeals were dismissed by the first appellate court vide judgment and decree dated 14.12.2005. The present appeal is by the alleged tenant in the suit property.

According to learned counsel for the appellant, the suit of the plaintiff should have been dismissed by the

courts below merely on the ground that the plaintiff's earlier suit was dismissed as withdrawn and the Court did not grant liberty to the plaintiff to file another suit. It is also submitted that on question of fact, two courts below committed serious error of law and wrongly decided the issue of tenancy against the appellant.

I have considered the submissions of learned counsel for the appellant and perused the reasons given by two courts below.

Admittedly, the appellant's case is that he was tenant in the suit property since before 5.11.1963. Admittedly, there is no rent deed and no rent receipt. The only evidence which has been relied upon by the appellant is the mortgage deed dated 5.11.1963 wherein there is no mention that “vacant possession was delivered to the mortgagee” and there is mention of fact that the mortgagee shall have the right to take the rent of the property in dispute. I do not find any reason to interfere in such finding of fact recorded by two courts below recorded after appreciation of evidence and particularly, where the appellant himself failed to produce any evidence to prove his tenancy in the suit property. Two courts below considered the mortgage deed and thereafter reached to the conclusion that even after reading the same, it cannot be inferred that the appellant was tenant in the property in dispute.

It will be worthwhile to mention here that learned counsel for the appellant heavily relied upon the language

used in the deed authorising mortgagee to take rent obviously, accordingly to learned counsel for the appellant, from the appellant. I do not find that such can be interpretation of the said document. In the said document, it is clearly mentioned that the mortgagor will not charge the interest on the advance amount and there will be rent. In that sequence, it is mentioned that the mortgagee shall have the right to take the rent but that does not mean that there was already a tenant in occupation. That only means that the mortgagee will take the rent obviously if there is tenant or it is let out. Be it as it may be, there is no mention that in the mortgage property, there is tenant and is giving any rent to the mortgagor.

Next contention of the learned counsel for the appellant is that the first appellate court committed serious error of law by misreading the mortgage deed and wrongly held that the mortgage deed contained the word of handing over the vacant possession of the property to the mortgagee, for this, learned counsel for the appellant submitted that the words delivery of “vacant possession” of the property to the mortgagee is not mentioned specifically in the deed. The argument is also not appealing to. The mortgage deed also does not contain the fact that the actual possession of the property has not been handed over to the appellant. In view of the above and at the cost of repetition, no evidence has been produced by the appellant about his tenancy of such a long period and this was sufficient ground for not entertaining his claim by the

courts below.

So far as the contention of learned counsel for the appellant that the first suit was withdrawn by the plaintiff, therefore, second suit was not maintainable, it is admitted case that the plaintiff filed application for withdrawal of the suit because of formal defect in the suit and that application was allowed. The withdrawal was not unconditional. If the court inadvertently did not mention that fact in the order-sheet permitting withdrawal of the suit, it has not affected the nature of the relief claimed by the plaintiff and relief can be read in the context in which it was sought. Apart from it, there is no reason to interfere by this Court in second appeal where substantial justice has been done by the two courts below.

In view of the above, no substantial question of laws arise in this appeal. Accordingly, this appeal having no merit, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya